Supreme Court, U.S.
FILED
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97-403
No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

DANIEL JOHNSON, ET AL.,
Petitioners,

v.

VICTOR RODRIGUEZ, ET AL.,
Respondents.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an actual injury requirement in the context of a claim for retaliation violates the Fourteenth Amendment.

2. Whether the receipt and use of victim's protest letters in the parole process violates the Equal Protection Clause.

LIST OF ALL PARTIES

Petitioners:	Daniel Johnson, Individually and on Behalf of all Present and Future Inmates of the Texas Department of Criminal Justice-Institutional Division
Petitioners:	Members of the Texas Board of Pardons and Paroles; Victor Rodriguez, Chair; Irma Cauley; Bennie Elmore; John Escobedo; Brendolyn Rogers-Gardner; Gerald Garrett; Donna Gilbert; Mae J. Jackson; Daniel Lang; Mary Leal; Winona Miles; Thomas W. Moss; Paul Prejean; Gilbert Rodriguez; Albert Sanchez; Terry Schnorrenberg; Cynthia Tauss; and W.G. (Billy) Walker.
	Members of the Texas Board of Criminal Justice; Allan B. Polunsky, Chair; Ellen J. Halbert; Joshua W. Allen, Sr.; John David Franz; Carol S. Vance; John R. Ward; R. H. (Rufus) Duncan, Sr.; Nancy Patton; and Carole S. Young.

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OPINIONS BELOW

The opinion of the magistrate judge is reported at 910 F.Supp. 1208 (Pet. Supp. App. 1a-53a). The opinion of the Fifth Circuit Court of Appeals is reported at 110 F.3d 299 (Pet. App. 1a-43a).

STATEMENT OF JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners base their claims upon the Fourteenth Amendment to the United States Constitution.

STATEMENT

Petitioners are a class of all current and future inmates within the Texas prison system. A magistrate judge determined: (1) that the parole board retaliates against inmate "writ writers" by denying them parole; and (2) that the parole board improperly utilizes retaliatory and unsubstantiated protest letters from judges, prosecutors, and law enforcement officials who participated in the inmate's original conviction when making parole determinations. The court of appeals reversed in part and remanded the magistrate judge's ruling on the "writ writer" claim.

REASONS FOR DENYING THE WRIT

I.

The Question Presented for Review Is Unworthy of this Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Petitioners advance no compelling reason in this case, and none exists. Further, the magistrate judge failed to find sufficient facts to support the applicable law. Thus, this Court's review would be nothing more than a fact finding exercise. The Petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

Petitioners' claims are foreclosed by this Court's decision in *Lewis v. Casey.*

In *Lewis v. Casey,* a prisoner class-action case from Arizona, the prisoner class alleged denial of access to the courts. 116 S. Ct. 2174 (1996). The magistrate judge entered a far-reaching injunction mandating system-wide changes in the prison law libraries and in the provision of legal assistance. In reversing the affirmance by the Ninth Circuit, the Supreme Court held that the system-wide challenge of the prisoners required that they establish widespread actual prejudice or injury. That requirement was correctly applied by the Fifth Circuit Court of Appeals in overturning the magistrate judge's finding of a systemic constitutional violation based upon only minimal instances of actual injury.

A. Writ Writers

Petitioners did not present any evidence that establishes that the Board retaliates against writ writers. He argued that because he and other inmates *perceive* themselves to be the victims of retaliation they have in fact been the victims of such retaliation. However, Johnson cannot identify one instance in the record where it has been established that an inmate was denied parole exclusively because of writ writing.[1]

Texas, like other states, is faced with a flood of meritless inmate litigation, which burdens the state and federal courts and wastes untold public resources. In an effort to control repeated frivolous filings, the courts and the federal and state legislative bodies have sought to penalize inmates for the repeated filing of what has been characterized as recreational litigation.

The magistrate judge made no distinction in its opinion between sanctionable, frivolous filings by inmates and cases which survive at least minimal review. However, other courts and legislative bodies routinely make such a distinction. Congress has provided stiff sanctions against such filings in the newly enacted Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626; the Texas Legislature in its last session passed stringent laws sanctioning prisoners for repeatedly filing frivolous lawsuits, TEX. GOV'T CODE ANN. § 498.0045; the federal courts routinely prohibit inmates from filing new cases without the court's consent because of the filing of frivolous lawsuits.[2] To order the

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[1]Indeed, the Fifth Circuit opinion indicated that factual insufficiency existed for both of Petitioners' claims which would argue against Supreme Court review of this matter.

[2]The federal district courts of Texas provide, on a monthly basis, a list of inmates who are barred from filing and/or who have been warned or sanctioned. The list for October 1997 contains over 1200 inmate names.

Respondents not to consider the fact that an inmate may have repeatedly filed numerous frivolous lawsuits at state expense is legally unjustifiable. This fact is relevant to the requirement that the Board determine that parole is in the best interest of society and that the inmate is able and willing to fulfill the obligations of a law-abiding citizen. TEX. CODE CRIM. PROC. art. 42.18 § 8(f). Indeed, the Board cannot, under the magistrate judge's order, even consider the fact that an inmate filed a pleading which threatened the court or court personnel or threatened other criminal activity.

Neither the magistrate judge nor the Petitioners properly considered the issue on writ writers because both the magistrate judge and the Petitioners considered all writ writing activity to be constitutionally protected. However, the constitution only protects those inmates seeking to file meritorious claims. *See Lewis* at 2181 n.3. So the magistrate judge not only erred in failing to address the issue of whether or not the Petitioners would have been paroled but for the consideration of their writ writing activity, the magistrate judge also erred in not considering whether that writ writing activity was protected as nonfrivolous.

B. Protest Letters

1. No Systemic Violation

The magistrate judge held that the use of protest letters constituted a constitutional violation and found that the "Board, as a rule, denies parole to inmates who have received protest letters." *Johnson v. Texas Department of Criminal Justice,* 910 F.Supp. 1208, 1229 (W.D. Tex. 1995). The magistrate judge, however, made only minimal factual findings to support this conclusion and made no findings whatsoever that "but for" the protest letters, the

inmates in question would have been paroled. In view of the fact that the evidence established that tens of thousands of inmates are reviewed for parole every year, the fact that the magistrate judge could identify only a dozen or so whose parole was denied because of a protest letter shows lack of the systemic violation that the Court in *Lewis v. Casey* required.[3] The lower court made no "but for" findings at all, failing to address the fact that the Petitioners who testified were some of the worst inmates in the prison system. Aggravated rape, homicide, capital murder and other such offenses routinely result in their perpetrators typically serving a substantially greater percentage of their maximum sentence than other inmates. Statistical evidence introduced at trial demonstrates that whereas non-aggravated offenders' median time served has decreased since 1985, violent and aggravated offenders have seen their median time served increase significantly. Daniel Johnson and the other inmates who testified herein have served only approximately one quarter of their actual sentences and cannot be said to have any legitimate expectation that they would have been granted parole.[4]

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[3]In that dozen, almost all of the magistrate judge's findings were factually erroneous according to the evidence submitted by Petitioners.

[4]As to virtually every one of the Petitioner inmates against whom a protest letter was lodged, and who was subsequently denied parole, the following pattern emerges from the evidence: the inmate was convicted of some violent and particularly heinous offense resulting in a very long sentence or life imprisonment. A protest letter was lodged by either the victim's family or the prosecutor or both, describing the heinous nature of the offense and giving an opinion that the inmate deserved to serve more time. The description of the incident as set forth in the protest letter was basically a recount of the indictment and evidence at trial. Thus, the letter was not the first time that the board was informed of the serious nature of the offense, since the information was already

2. Petitioners' Misapprehension

Petitioners misapprehended their burden and the magistrate judge relied upon that misapprehension and so reached the wrong conclusion. The magistrate judge expressed concern that protest letters could be considered in the parole decision when the inmate was not given the opportunity to correct allegedly erroneous information in those letters and that information was not verified before being used. This concern of the magistrate judge is based upon two assumptions, neither of which is correct.

The magistrate judge assumed that an inmate up for parole consideration is involved in a proceeding in which due process protections are warranted. Thus, the magistrate judge's concern about findings that parole decisions might have been based upon matters not in the criminal record, that information might have been beyond the scope of the jury verdict, that statements made by victims might not be "relevant," might be evidentiarily "inadmissible" and other such due process matters is misplaced. The magistrate judge's findings and holdings appear to be premised upon the theory, nowhere articulated, that the parole decision is a proceeding to which due process protections for the inmate apply. This is not the law. Thus led astray, the magistrate judge then erroneously concluded that the inmate should be entitled to rebuttal and other due process safeguards.

Unfortunately, the magistrate judge reversed the situation by trying to fit the parole process into a due process paradigm. This ignores the system established by state statute. That system

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before the board in the form of the conviction and various supporting documents routinely found in the inmate's parole file. Parole was then denied, based upon the violent nature of the offense, of which the letter was simply a reiteration.

provides for the widest possible latitude in the receipt of information which bears upon the parole process. It permits the inmate and his family to input every bit of information that they wish to bring forward before the board. No one "verifies" this information, nor is it stricken if it contradicts the jury verdict. Thus, inmate Bright, a convicted felon, was allowed to claim that "he didn't do it" in referring to the offense for which he is imprisoned, and such information is considered by the Board even though it goes against the judgment of conviction.

The magistrate judge also erroneously assumed that information received in the form of protest letters is "evidence" against the inmate which he should be able to rebut. The fact that in some cases victims or public officials send information to the Board does not make that information "evidence" against the inmate which he would have a constitutional right to rebut. That information itself is the rebuttal; it is the rebuttal to the information put forth by the inmate, even though the victims and the public officials are not permitted to see the inmate's version before they send in a protest letter. All information received is confidential, not just the information which might request that parole be denied.

All parole files contain the inmate's version if he chooses to give it; some files also contain information from other sources if such sources choose to provide it.

3. Community Sentiment

The protest letters received from victims and public officials are not "evidence" which needs to be responded to by the inmate. They are instead a reflection of the sentiment of the community and thus rebuttal is unwarranted. The parole panels are permitted to consider such sentiment by § 8A(b)(2)(A), of the Texas Code of Criminal Procedure which permits the receipt of "written expressions of significant public concern..." regarding the possible residence of a parolee. They are also permitted by the

mandate to the Board to order parole only for the "best interest of society" Art. 42.18, § 8(a), Texas Code of Criminal Procedure. It is not possible to rebut "sentiment." It is merely an expression of concern and the perception of the person who expresses it. The fact that an inmate might disagree with the sentiment is irrelevant. The sentiment itself remains whether disagreed with or not and thus rebuttal serves no legal purpose.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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